IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

NO.

UNITED ENTERPRISES, INC.,
Petitioner,

vs.

ANNE DUBEY, EVA A. LOWTHER, and LEE ORA BROWN, Being and Comprising the Members of the Florida State Board of Beauty Culture Examiners,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

I.

The Opinion.

The petitioner herein by a petition for a writ of certiorari seeks a review of a judgment and opinion of the

United States Circuit Court of Appeals for the Fifth Circuit, which judgment and opinion is found in the Record, pages 69-72; the same is reported in 128 Fed. 2nd, at page 843. This said judgment and opinion is an affirmance of a judgment and opinion of the United States District Court for the Northern District of Florida in this cause, which opinion is set out in the Record, pages 59-62, and is reported in 42 Fed. Supp. 60.

II.

Statement of the Grounds Upon Which the Jurisdiction of the Supreme Court of the United States Is Invoked.

This statement is set out in the preceding petition under II, pages 12 to 14, which is hereby adopted, and made a part of this brief by reference.

III.

Statement of the Case.

A concise statement of the case containing all that is material to the consideration of the questions presented is set out in the preceding petition under I, pages 1 to 12, which is hereby adopted and made a part of this brief by reference.

IV.

Specification of the Error Intended to Be Urged.

This specification is set out in the preceding petition under III, pages 14 to 15, and is hereby adopted, and made a part of this brief by reference.

V.

ARGUMENT.

Summary of Argument.

1. The Supreme Court of the United States has jurisdiction to pass upon the Federal questions presented by the petition for writ of certiorari herein.

2. The United States Circuit Court of Appeals for the Fifth Circuit erroneously affirmed the judgment and decision of the trial court upon the merits of this cause of action.

(A) The business of the petitioner in the State of Florida is interstate in character and as such, petitioner is entitled to the Federal constitutional protection afforded its business.

(B) The Florida beauty culture law is an invalid, arbitrary and unreasonable attempt to exercise the police power on the part of the State of Florida in that it attempts to place an unreasonable and arbitrary burden upon petitioner's interstate business in the State of Florida, and constitutes a regulation, as applied to petitioner's said business, that has no reasonable or substantial relation to any question of public health.

I.

The Supreme Court of the United States has jurisdiction to pass upon the federal question presented by the petition for writ of certiorari herein.

The United States Supreme Court has jurisdiction to pass upon the within petition by virtue of the provisions of Section 240(a) of the Judicial Code of the United States, 28 U.S.C.A. 347(a). Jurisdiction of this cause in the United States District Court for the Northern District of Florida in the first instance is predicated upon the diversity of citizenship, and the amount or value of the matter in controversy being in excess of three thousand dollars. (Section 24 of the Judicial Code of the United States as amended, 28 U.S.C.A. 41.) The jurisdiction of the trial court over the subject matter of this cause of action has been properly sustained by the United States Circuit Court of Appeals for the Fifth Circuit in their written opinion herein (Rec. 69-72) (128 Fed. 2nd, 843).

II.

The United States Circuit Court of Appeals for the Fifth Circuit erroneously affirmed the judgment and decision of the United States District Court for the Northern District of Florida upon the merits of this cause of action.

A.

The business of the petitioner in the State of Florida is interstate in character. The petitioner is engaged in the manufacture and sale of cosmetics. Its plant and principal place of business is at Evansville, Indiana. They follow a direct sales method and their products are sold only in interstate commerce. This sales method was fol-

lowed in Florida and elsewhere. A representative of the petitioner in a duly licensed beauty shop would give a free demonstration of petitioner's products to an interested prospective purchaser. This was without charge or obligation, and the only profit derived by the petitioner was upon the possible sale of such product to such prospective purchaser. This demonstration consisted of the application of a small portion of cold cream or other cosmetic preparation, or both, to the face of the prospective purchaser. If an order of cosmetics was sold to such person, such order was shipped direct from Evansville, Indiana, by parcel post, C.O.D. to the customer in Florida. This sales method is to all intents and purposes, identical with that employed by the manufacturer in the case of *Realsilk Hosiery Mills* v. *the City of Portland*, 268 U. S. 325, 69 L. Ed. 982, wherein the United States Supreme Court held that such a transaction constituted interstate commerce. This case is decisive of that question.

That part of petitioner's sales practice or technique which consists of the giving of said demonstration of their products is not localized and separate from their sales procedure, but is a part and parcel of the whole transaction. Petitioner's sales people are not practicing beauty culture. They are selling merchandise. They do not hold themselves out as beauticians. They do not practice any of these many varied practices, the whole of which constitutes the practice of beauty culture. In making a sale of cosmetics, and purely as an incident thereto, nothing more whatever, they permit a prospect to sample their product. These demonstrations most certainly formed a part of an interstate transaction, as much as the writing up of the order to be mailed to the home office.

B.

This being purely an interstate transaction, this business of the petitioner was subject to the constitutional protection afforded it by Article 1, Section 8, Clause 3 of the Federal Constitution and the Fourteenth Amendment thereto. The petitioner's right to so transact said business included the right to be free from regulation or imposition by the State of Florida. This broad statement is subject to the right of the State of Florida to the enactment of regulatory statutes under the police power, which in turn is subject to the further limitation that a regulation under the police power must be reasonable, and bear some reasonable and substantial relation to the public health problem involved.

The Florida Beauty Culture Law, as the regulation in question, is unreasonable and as it affects petitioner's business in the State of Florida, it bears no reasonable or substantial relation to the public health problem involved.

The Florida Beauty Culture Law (Rec. 31-57) to be sustained as a proper exercise of the police power must be a reasonable regulation, and such regulation must have a reasonable relation to the public health problem involved.

Baker v. *Daly* (Fed. D. C.) 15 Fed. 2nd, 881;
Board of Cosmetological Examiners of Jefferson County v. *Gibbons* (Ala), 193 So. 116;
Hoff v. *State* (Del.), 197 Atl. 75;
State v. *Knight* (W. Va.), 191 S. E. 845;
Opinions of Attorney General of Indiana, 1937, p. 345;
State v. *Walker* (Wash.), 38 Pac. 2nd, 364;
Ex parte Lucas (Mo.), 61 S. W. 218;
Schneider v. *Duer* (Md.), 184 Atl. 914.

The appellant has a constitutional right to transact its business, interstate in character, in the State of Florida unhampered by unreasonable regulations of the Florida Beauty Culture Act, which have no reasonable relation to the public health problem involved.

The requirements of the Florida Beauty Culture Law that a sales person in the State of Florida be required to devote 20 months of study of unrelated subjects and apprenticeship before being permitted to apply a small sample of appellant's merchandise by way of demonstration to the face of another is an unreasonable and arbitrary requirement that has no relation to the public health.

The State cannot, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupation or impose unreasonable or unnecessary restrictions upon them.

Smith v. *Texas*, 233 U. S. 630;
Burns Baking Company v. *Bryan*, 264 U. S. 504, 513;
Weaver v. *Palmer Brothers Company*, 270 U. S. 402;
Liggett Company v. *Baldridge*, 278 U. S. 105, 113;
Lawton v. *Steele*, 152 U. S. 133, 38 L. Ed. 385;
Baker v. *Daly* (D. C. Oregon), 15 Fed. 2nd, 881;
Marx v. *Maybury* (D. C. Washington), 30 Fed. 2nd, 839.

While it is proper for the Legislature to create classes for the purpose of legislation, such classifications must not be arbitrary or unjust and must not arbitrarily include within the class persons having no reasonable relation to the classification.

Weaver v. *Palmer Brothers Company*, 270 U. S. 402;
Baker v. *Daly* (D. C. Oregon), 15 Fed. 2nd, 881.

What is a reasonable exercise of the police power under any circumstances depends largely upon the nature and character of the undesirable conditions to be overcome or prevented. There must be some logical connection between the object sought to be accomplished by the legislation and the means prescribed to accomplish such purpose. There must be some real or substantial relation between the regulation and the protection of the public. The right of a citizen to engage in a lawful and useful calling is a right that cannot be arbitrarily interfered with.

What is there wrong or invalid about the requirement of the Florida Act that one to practice beauty culture must be registered? Is not there a public health problem involved in the application of cosmetics to the face of another with the human hands? Should not one who so practices on the general public be subjected to a physical examination to show freedom from commutable diseases? Does not this justify this Florida enactment? If the Florida Act went no further than to require a representative of the petitioner to pay a reasonable fee for a permit and as a condition for receiving such a permit, such applicant be required to show by physical examination freedom from contagious diseases, petitioner would not question the validity of the Florida Act. Undoubtedly, the State of Florida could so regulate the business of the petitioner. But that is not the question here presented.

What are the regulations that the State of Florida seeks to impose upon the petitioner's business through licensing requirements? How does one get a license or a certificate of registration in the State of Florida? Under Section 5 of the Act, any person is qualified to receive a certificate of registration to practice beauty culture who has:

Qualified under Section 6 of the Act. Section 6 fixes the requirement for a person to first qualify and receive a certificate of registration as a junior operator. In other words, before you can apply for a certificate of registration you must first become a junior operator. Among other requirements, to receive a certificate as a registered junior operator a person must have been graduated from a school of beauty culture approved by the Board and have passed a satisfactory examination conducted by the Board to determine his or her fitness to practice as a junior operator, which shall cover all the unrelated practices defined in Section 2. Thus, in order to become a mere junior operator, a person must be a graduate of an approved beauty culture school, and be able to pass an examination in the following subjects:

"Cutting or bobbing the hair.

"Facial and scalp massage or treatment with oils, creams, lotions or other preparations.

"Singeing, shampooing, or dyeing the hair or applying hair tonics.

"Applying cosmetic preparations, antiseptics, powders, oil, clay, or lotions to scalp, face, or neck.

"Hairdressing or the arranging, waving, dressing, curling, cleansing, thinning, cutting, singeing, bobbing, bleaching, tinting, coloring, steaming, straightening, dyeing, brushing, beautifying, or otherwise treating by any means the hair of any person.

"Manicuring, or the cutting, polishing, tinting, coloring, cleansing, or manicuring the nails of any person, and massaging.

"Pedicuring or the shaping, polishing, tinting, coloring, cleansing, or pedicuring the nails of the feet of any person, and massaging or beautifying the feet of any person.

"Permanent waving or the preparing, arranging, curling, cleansing, and treatment of the hair for curl-

ing, by the use of permanent waving machines, mechanical appliances, or chemical heat devices or heat materials, or chemical means."

Section 7 of the Act provides that no school of beauty culture shall be approved except those that require as a prerequisite to graduation a course of instruction and practice of not less than 1000 hours of continuous study and practice, of not more than 8 hours in any one day, within a period of 12 months, and such course of instruction to include the following subjects:

"Scientific fundamentals for beauty culture, physiology, hygiene, elementary chemistry relating to sterilization and antiseptics, massaging and manipulating the muscles of the face, neck and scalp, hair cutting, bobbing, hair trimming, and dyeing the hair, shop management and business methods, facial and scalp massages, or treatment with oils, creams, lotions or other preparations, shampooing, singeing, or applying hair tonics, applying cosmetic preparations, antiseptics, powders, oils, clay or lotions to scalp, face or neck.

"Hairdressing or the arranging, waving, dressing, curling, cleansing, thinning, cutting, singeing, bobbing, bleaching, tinting, coloring, straightening, dyeing, brushing, beautifying or otherwise treating by any means the hair of any person.

"Manicuring or the cutting, trimming, polishing, tinting, coloring, cleansing, or manicuring the nails of any person, and massaging, cleansing, treating or beautifying the hands or feet of any person.

"Pedicuring, or the shaping, polishing, tinting, coloring, cleansing the nails of the feet of any person.

"Permanent waving, or the preparing, arranging, curling, cleansing, and treatment of the hair for curling, by the use of permanent waving machines, mechanical appliances or chemical heat devices or heat materials, or other chemical means.

"Removing superfluous hair from the body of any person by the use of electrolysis, or by the use of depilatories, by the use of tweezers, chemical preparation, or by the use of devices or appliances of any kind or description, except by the use of light waves commonly known as rays."

Thus a junior operator must spend 6 months in school, devoting 1000 hours to the study of some 70 or more unrelated subjects, having no relation to any health problem incident to giving a demonstration of cosmetics to a prospective purchaser. Completing this course of study does not yet qualify one.

In addition to having qualified as a junior operator, such applicant for a certificate of registration must under Section 5C show evidence of having practiced as a registered junior operator for a period of 12 months under the immediate supervision of a registered beautician, and in a shop wherein a majority of the practices of beauty culture are engaged in.

Therefore, in order to become a licensed and registered beautician in the State of Florida, a representative of the petitioner in order to apply a portion of the contents of one jar of cold cream to the face of a prospective purchaser, must have followed and pursued a course of study in an approved beauty school for a period of not less than 6 months, for at least 1000 hours, and have practiced as a junior operator for a period of not less than 12 months. 18 months in all devoted to study and apprenticeship, of a variety and conglomeration of subjects having no relation whatsoever to the public health problem involved in the demonstration of cosmetics to a prospective purchaser by the application of a portion thereof to the face of such

prospective purchaser. Can it be denied that these regulations are unreasonable? Is it reasonable to require a sales person of the petitioner to spend months of study in such unrelated subjects as hair straightening, bleaching of the hair, manicuring, removing superfluous hair by electrolysis, when at no time does the representative of the petitioner attempt to do any of those things, or intend to do so? That is not their business. They are only interested in selling cosmetics.

An examination of these three sections of the Florida Act to which we have referred, namely, Sections 2, 5, 6 and 7 of the Act, will reveal that a person, in order to become a registered beautician in the State of Florida, must be able to show study, education, proficiency and apprenticeship in a variety of numerous unrelated subjects. This will require that such applicant spend the full 18 months preparing herself for types of work which she does not intend or hold herself out as ready and able to perform. Certainly, these regulations are unreasonable.

How could a representative of the petitioner secure a license or a certificate of registration in the State of Florida merely by furnishing a health certificate? We admit that if this one regulation constituted the only regulation of the State of Florida, the petitioner would be bound to comply with it, and would be in full accord with such a provision. But this does not answer the criticism which petitioner has leveled against the other regulations, which bear no relation to the public health, safety or general welfare of the citizens of Florida.

It is interesting to note that under Section 4 of the Act, manicuring is exempted from the licensing provisions sought to be imposed against the sales persons of the peti-

tioner. Apparently, the Florida Legislature recognized that it was unreasonable to impose upon manicurists the requirement that they submit to all these unreasonable regulations. By the same reasoning, why should sales persons who demonstrate cosmetics be subjected to all these unreasonable requirements? Why should they be subjected to greater regulation than a manicurist? If it is unfair to require a person who performs no other service than manicuring to become adept in other branches of the beauty trade, it appears to us that it is likewise unfair to impose these restrictions upon the petitioner.

In this brief, we have supported the position urged by the petitioner in this cause by the citation of a number of authorities. We believe these authorities are sound, and clearly state the law in favor of the petitioner on the merits of this controversy. First and foremost of these cases is a case from the Federal District Court of Oregon, the case of *Baker* v. *Daly*, 15 Federal 2nd, 881.

This case is in point. Quoting from the opinion of the Court in this case:

> "* * * Cosmetic therapy is declared by the act to be 'the application of the hands or of mechanical or electrical apparatus, with or without cosmetic preparations, tonics, lotions, creams or clays, to massage, cleanse, stimulate, manipulate, exercise, or otherwise improve or beautify the scalp, face, neck, shoulders, arms or upper part of the body, removing superfluous hair, manicuring the nails of any person, male or female, and to arrange, dress, curl, wave, cleanse, cut, single, bleach, color or similarly treat the hair of any female'.
>
> "The plaintiffs are expert in waving the hair of females and earn their living thereby. They are not proficient in any of the other kinds of work named in

the act, and are not able to qualify therein, nor do they desire or intend to do any such work. They contend that as to them the law is arbitrary, unreasonable, oppressive, and deprives them of the protection afforded by the 'Fourteenth Amendment to the Constitution of the United States, which declares that no state shall deprive any person of life, liberty, or property without due process of law.'

"This constitutional provision has been declared by the Supreme Court to mean, 'not only the right of the citizen to be free from mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation.' The right thus granted is, of course, subject to the police power of the state to enact laws essential to the public safety, health, or morals; but, to justify a state in exercising such authority, it must appear that the interest of the public requires such interposition, and that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive to individuals. 'The Legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business, or impose undue and unnecessary restrictions upon lawful occupations.'

"In our opinion the legislation in question violates that rule. It arbitrarily groups together different and unrelated callings or professions, and forbids citizens from following one of them without qualifying, under the enactment, in all the others. It includes in the definition of cosmetic therapy (1) massage; (2) removing superfluous hairs; (3) manicuring; and (4) arranging, dressing, curling, etc. the hair of any female—and provides that no person shall follow any one of these occupations without being qualified in all the others. Thus one may be an expert in one of the callings spe-

cified, and prohibited and forbidden from following it and earning his living thereby, unless, in the judgment of the board of examiners, he is qualified to practice all the others. This, in our opinion, is an arbitrary and unreasonable exercise of legislative authority, and deprives the plaintiffs of the right, guaranteed them by the Constitution, to work and earn their living by a lawful occupation.

"It follows, therefore, that the motion to dismiss should be overruled, and injunction issued."

This case is without question decisive of the question of this appeal.

Petitioner also relies on the case of *Hoff* v. *State*, (Del.), 197 Atl. 75, from which the following is quoted:

"The police power is far reaching and elastic. It embraces everything essential to the public health, safety and morals. It is the source from which the Legislature derives its authority to regulate and control professions, trades, occupations and businesses. It is not, however, without limits, and a limitation of the power is the due process clause of the Fourteenth Amendment to the Federal Constitution, which requires that the regulation be reasonable, and that the means of regulation shall have a real and substantial relation to the object to be obtained. * * *

"To justify the State in interposing its authority in behalf of the public, it must appear that the interests of the public, as distinguished from those of a particular class, demand such interference; that the means employed are reasonably necessary for the accomplishment of the purpose; and that they are not unduly oppressive on individuals. The Legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations; nor is the determination by the Legislature as to what is a proper exercise of its police

power final and conclusive, but is subject to supervision by the courts. * * *

"Courts should be careful to sustain the proper exercise of the police power for the protection of the public health and safety, and, in so doing will not hesitate to overthrow or limit private rights in conflict therewith. On the other hand, Courts will freely interpose by judicial veto, when a lawful occupation is unreasonably and arbitrarily interfered with or restricted under the guise of protecting the public welfare."

The petitioner also relies on the Maryland case of *Schneider* v. *Duer,* 184 Atl. 914, from which the following is quoted from the opinion of the Court:

"Under this act persons desiring to engage in that occupation are met with requirements entirely out of proportion with the character and purposes of this trade and with the safeguards that seem just and fair to the public. They constitute an arbitrary prohibition rather than a reasonable approach to a lawful and chosen work. These restrictive measures strike at the foundation of the trade, in that they wrongfully and illegally interfere with those who wish to engage in it, and, if strictly enforced, few would be able to accept this calling and engage in its activities. This constitutes an unreasonable and illegal exercise of police power. * * *

"In order to obtain a license to practice this simple trade, one must have had 10 years of educational preparation. He must have been a graduate of the eighth grade and have completed a 2 year course in a barber school or a barber shop. If working in a shop, his services must continue for at least 8 hours a day. These are manifestly unreasonable requirements to enter a simple occupation.

"But, in addition to these educational prerequisites, we find the following provision in the act requiring that the course of instruction shall include the following subjects: 'Scientific fundamentals for barbering,

hygiene, bacteriology, histology of the hair, skin, nails, muscles and nerves, structure of the head, face and neck, elementary chemistry relating to sterilization and antiseptics, disease of the skin, hair, glands and nails, haircutting, shaving and arranging, dressing, coloring, bleaching, and tinting of the hair' * * * Such requirements are obviously far beyond the need of this trade; in fact, even a fundamental knowledge of all these studies and sciences is beyond the reach of persons except those with advanced education. * * *

"It is unreasonable that such standards should be set for this occupation. There is an apparent design, although indefensible and unreasonable, to give to this simple and useful trade the characteristics and standards of a highly technical profession, surrounded with requirements, grades, and divisions such as one might expect to find in those professions where life, liberty and property are of every day concernment. There is no parallel to be drawn between such callings, and an effort to constitute an artificial equality by police regulations cannot be accepted as a constitutional exercise of legislative power. * * *"

Another Washington case sustaining this proposition is the case of *State* v. *Walker*, 38 Pac. 2nd. 364. Here it was held that it is competent for the legislature, by virtue of the police power to prohibit persons from practicing the calling of a barber without first having obtained a license or certificate of registration, the health of citizens, as affected by the diseases spread from barber shops conducted by unclean and incompetent barbers, justifying the exercise of such power. But the provisions of the Washington statute for the regulation of barbers have been held to be valid only in so far as they promote the public health and safety. In this case, it was held that if a statute authorized a board of examiners to reject an application for a barber's license on the ground that the applicant lacked

proficiency in matters not affecting the public health or safety, it was to that extent, a deprivation of liberty without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution.

Both the District Court and the Circuit Court of Appeals in this cause were led into error by the evident high purposes precipitating the passage of the statute in question. Undoubtedly many features of the beauty shop business create definite health problems and surely it was within the power of the State of Florida to correct same. But this does not mean that the State of Florida, to correct health problems in the beauty shops of Florida, can impose upon petitioner's business such a set of arbitrary regulations as are revealed in this cause of action. The imposition of these regulations upon petitioner's business has not the remotest relation to these health problems, and the same do not constitute measures even designed to correct these health problems. These regulations as applied to the trade of beauty culture in general, may or may not be reasonable, but as applied to petitioner's business, they are arbitrary, unjust and definitely burdensome.

The petitioner respectfully urges that upon the basis of the authorities herein cited, and upon the undisputed facts of this cause of action, the writ of certiorari herein prayed for should be granted, to the end that the Supreme Court of the United States may reverse the Circuit Court of Appeals for the Fifth Circuit in this cause.

Respectfully submitted,

UNITED ENTERPRISES, INC.,
Petitioner.

By THEODORE LOCKYEAR,
ELMER Q. LOCKYEAR,
Attorneys for Petitioner.

Dated at Evansville, Indiana, this 4th day of September, 1942.